51 N. J. L. 62. It has been held that the distinction necessary to make a class, under the constitutional prohibition of special and local legislation, must be something in the situation or circumstances of the places embraced by the enactment which would render like powers, if granted, inappropriate to and unavailable for, other places. *State, ex rel. Van Giesen* v. *Inhabitants of Bloomfield et al.* (1885), 47 N. J. L. 442, 2 Atl. 249; *City of New Brunswick* v. *Fitzgerald* (1886), 48 N. J. L. 457, 8 Atl. 729.

The whole question in the principal case resolves itself into this, Is there any reason why cities having a population of not less than one hundred thousand and not more than two hundred thousand inhabitants need government by boards and consequent centralization of political responsibility in the mayor which would not apply with equal force to smaller cities or cities of greater size. The dissenting Justices thought not, and so considered the classification illusive and the law unconstitutional. The majority of the court, reasoning that it is the duty of the judiciary to determine, not whether in their opinion the correct view was that there were good reasons why this form of government should be applied to cities of the specific size designated by the act and to no others, but rather to determine whether there was a permissible view which the legislative department of government might have taken which would support the act, concluded that the view that cities of this certain size had a peculiar need for such form of government was permissible, and that, for them to determine whether such view were the best one would be to usurp a legislative function, and upheld the act as constitutional. In their method of interpreting their duty in the premises they are supported by Justice GARRISON'S opinion in *Booth* v. *McGuinness* (1910), — N. J. —, 75 Atl. 455, and even though one were inclined to question whether the need of such centralization of responsibility by such form of government is peculiar to cities of the size designated by the act, one would hesitate to criticise the decision as opposed to the weight of authority. G. S.

LEGAL CONSEQUENCES OF FAILURE OF A FOREIGN CORPORATION TO OBTAIN AUTHORITY TO TRANSACT BUSINESS.—Whether a foreign corporation which has not complied with the statutes of a state prescribing the terms on which the corporation may transact business, can enforce a contract in the state courts is a proposition concerning which American decisions are irreconcilably in conflict. The questions of law herein involved are well illustrated by the case of *Model Heating Co.* v. *Magarity* (1910), — Del. —, 75 Atl. 614.

The facts of the case in question were, briefly, as follows: Plaintiff installed a heating apparatus in the dwelling house of the defendant at the special instance and request of defendant, and brought an action of assumpsit to recover the balance of the price due therefor. Plaintiff declared upon a special contract and on the common counts. The defendant, in avoidance of the action, pleaded, *inter alia*: That plaintiff was a foreign corporation, and had not, at or prior to the bringing of this suit, complied with the provisions of Art. 9, § 5 of the Constitution of the State of Delaware, to wit: "No foreign corporation shall do any business in this state * * * without having

an authorized agent or agents in the state upon whom legal process can be served." Nor had said plaintiff complied with the provisions of Chapter 395, Vol. 22, Laws of Delaware, by filing in the office of the Secretary of State a certified copy of its charter and the name or names of the authorized agent or agents in the State of Delaware, together with a sworn statement of the assets and liabilities of such corporation, and paid to the secretary of State for the use of the state, fifty dollars, nor had the Secretary of State delivered to any agent or agents of said corporation located in this state his certificate, under his seal of office, of the filing of such charter.

To this plea the plaintiff filed a general demurrer, contending that, as § 6 of Chap. 395, Vol. 22, Laws of Delaware, makes a violation of the statute by a foreign corporation a misdemeanor and imposes a penalty of not less than two hundred, nor more than five hundred dollars for noncompliance therewith, but does not specifically declare contracts made in violation of the statute void, such contracts are not void. *Held,* by the court, that the contract was void and unenforceable, and the demurrer was overruled.

For this view, the Delaware court has ample justification in Delaware (*Beeber* v. *Walton, Whann & Co.,* 7 Houst. 471, 32 Atl. 777) as well as in many other states of the Union. *Aetna Ins. Co.* v. *Harvey* (1860), 11 Wis. 412; *Cincinnati Mut. Health Assur. Co.* v. *Rosenthal* (1870), 55 Ill. 85; *Hoffman* v. *Banks* (1872), 41 Ind. 1; *Holt* v. *Green* (1873), 73 Pa. St. 198; *Thorne* v. *Travellers' Ins. Co.* (1875), 80 Pa. St. 15; *Cassaday* v. *American Ins. Co.* (1880), 72 Ind. 95; *Dundee Mortgage and Trust Investment Co.* v. *Nixon* (1891), 95 Ala. 318; *S. H. Seamans* v. *Temple Co.* (1895), 105 Mich. 400; *Pittsburg Const. Co.* v. *West Side Belt Ry. Co. et al.* (1907), 154 Fed. 929, 83 C. C. A. 501, 11 L. R. A. N. S. 1145.

The reasoning of the courts which adopt a view in accord with the cases above is based on the legal maxim, *"Ex turpi non oritur actio,"* according to which the doctrine is laid down that no individual or corporation will be allowed to make its own violation of the law the ground of an action in the courts of the sovereignty whose law it has violated, so as to maintain an action upon the contract. 13 AM. AND ENG. ENCYC. OF LAW, 875; 19 CYC. 1297.

Although this view is in accordance with the settled policy of the law regarding many acts prohibited by statute which are contrary to public policy, yet the weight of authority clearly favors the doctrine that a foreign corporation, which has failed to comply with a statute merely directory or administrative in nature, which does not expressly specify that contracts executed by a non-complying corporation shall be void, can enforce such a contract. Especially is this true in case the statute expressly imposes a penalty for noncompliance therewith.

American decisions furnish three distinct grounds for doubting the accuracy of the doctrine illustrated by *Model Heating Co.* v. *Magarity,* supra, to wit: (I) In case a directory statute imposes a distinct penalty for noncompliance therewith, without expressly declaring that contracts executed by a non-complying foreign corporation shall be void, the penalty is to be adjudged exclusive and the contract itself enforceable. (II). A defendant

sued on a contract made with a foreign corporation is *estopped* from relying on the failure of the corporation to comply with the statutes prescribing the terms on which it may do business in the state, as a defense to the action. (III). A defendant sued by a corporation on a contract made with it cannot question the right or authority of the corporation to make the contract or to transact business in the state in which the contract was made; such question being within the exclusive province of the state, *i.e.* the state only can complain. Each of these will be considered seriatim.

(I). There is no question but that if a foreign corporation transacts business which is repugnant to a statute, the object of which is manifestly to prohibit the business as an exercise of police power, on the ground that the business would be immoral, or criminal in its nature, or dangerous to life, health or property, the presumption must prevail that legislative wisdom intended to stamp it out; and no contract arising out of such business can be enforced. In such a case, the maxim, *"ex turpi non oritur actio,"* is conclusive. Likewise, if the statute is imposed as a regulation of trades or professions which are *per se* innocent, but which would be dangerous to life, health or property, if not carried on in compliance with statute; *e.g.* statutes regulating medical practice, contracts arising therefrom are void and unenforceable. *Dudley* v. *Collier & Pinckard,* 87 Ala. 431; *Melchoir* v. *McCarty,* 31 Wis. 252, 11 Am. Rep. 605; *Prescott* v. *Battersby,* 119 Mass. 285. But when the act of a foreign corporation is innocent *per se,* and the statute affecting the corporation is imposed merely as an administrative regulation, without expressly specifying that contracts executed by a non-complying corporation shall be void, and a distinct penalty is imposed for non-compliance with the statute, such penalty should be deemed exclusive and the contract itself valid and enforceable. *Columbus Ins. Co.* v. *Walsh* (1853), 18 Mo. 229; *Larned* v. *Andrews* (1871), 106 Mass. 435; *Union Mut. Ins. Co.* v. *McMillen* (1873), 24 Ohio St. 67; *Manhattan Ins. Co.* v. *Ellis* (1877), 32 Ohio St. 388; *Nat. Bank* v. *Matthews* (1878), 98 U. S. 627; *Rahter* v. *First Nat. Bank of Lancaster* (1880), 92 Pa. St. 393; *De Mers* v. *Daniels* (1888), 39 Minn. 158, 39 N. W. 98; *Fritts* v. *Palmer* (1889), 132 U. S. 282; *Toledo Tie & L. Co.* v. *Thomas* (1890), 33 W. Va. 566; *Washburn Mill Co.* v. *Bartlett* (1893), 3 N. D. 138, 54 N. W. 544; *Edison General Elec. Co.* v. *Can. Pac. Nav. Co.* (1894), 8 Wash. 370; *State Mut. Fire Ins. Co.* v. *Brinkley Stave & Heading Co.* (1895), 61 Ark. 1; *Rockford Ins. Co.* v. *Rogers* (1897), 47 Pac. 848; *Security Savings & Loan Ass'n* v. *Elbert et al.* (1899), 153 Ind. 198; *Blodgett* v. *Lanyon Zinc Co.* (1903), 120 Fed. 894; *Thompson* v. *Nat. Mut. Building & Loan Ass'n.* (1905), 57 W. Va. 551, 50 S. E. 756; *Dunlap* v. *Mercer et al.* (1907), 156 Fed. 545, 86 C. C. A. 435; *Iowa Lillooet Gold Min. Co.* v. *U. S. Fid. & Guar. Co.* (1909), 146 Fed. 439, and many others.

When studied, the cases on this subject are all found seeking one common object—the legislative intent. The manifest object of the statutes of the various states, providing that foreign corporations, before transacting business in a state, shall comply with certain conditions, such as filing copies of their charters, making statements of their financial condition, appointing agents upon whom process can be served, et cetera, is to place them on a

level with domestic corporations, impose upon them the same duties, obligations and liabilities, and subject them, equally with domestic corporations, to the jurisdiction of the courts of the state; this as a source of revenue to the state, and for the protection of its citizens and others dealing with them in that state, and not to strike down and avoid their contracts. *Iowa Lillooet Gold Min. Co.* v. *U. S. Fid. & Guar. Co.,* supra. In *Fritts* v. *Palmer,* supra, the court say: "The fair implication is that in the judgment of the legislature, the penalty was ample to effect the object of the statutes prescribing the terms upon which foreign corporations might do business in this state. It is not for the judiciary at the instance or for the benefit of private parties, to inflict an additional and harsh penalty by declaring contracts made without statutory authority wholly void."

A recent case closely resembling *Model Heating Co.* v .*Magarity* is that of *Blodgett* v. *Lanyon Zinc Co.,* supra. The appellant in that case sought to avoid a lease made with appellee's assignor, defending on the ground that appellee, a foreign corporation, had failed to comply with the statutes of Kansas regulating foreign corporations and the method by which they may be permitted to transact business in that state. The court held that where a contract or an act in performance of it is not malum in se, and its invalidity is not declared as a penalty for the violation of the statute, the courts may not so declare it, and thus affix a penalty not prescribed by the law-making power. This doctrine is affirmed by Mr. Morawetz in the following language: "It is clearly not the primary purpose of the legislature, in passing these statutes, to render the contracts and dealings of corporations which have not complied with the statutes, void and unenforceable. Hence where the legislature has not expressly declared that this result shall follow from a failure to comply with the statutes, the courts ought not to imply such a result, unless this be necessary in order to attain the primary object for which the statute was passed, **** and if the statute imposes a penalty on the corporation or its agents for failing to comply with the prescribed formalities, the penalty will be deemed exclusive of any others. 2 MORAWETZ, PRIV. CORP. § 665.

(II). That a defendant, as in *Model Heating Co.* v. *Magarity,* supra, after having received the benefit of a contract, should be permitted to assert the invalidity of the contract on the ground that the plaintiff, a foreign corporation, has failed to comply with the statutes prescribing the terms on which it might do business in the state, is denied by many courts on the ground of estoppel. *Brooklyn Life Ins. Co.* v. *Bledsoe* (1875), 52 Ala. 538; *Swan* v. *Watertown Fire Ins. Co.* (1881), 96 Pa. St. 37; *Kilgore* v. *Smith* (1888), 122 Pa. St. 48, 15 Atl. 698; *Watertown Fire Ins. Co.* v. *Rust* (1892), 141 Ill. 85, 30 N. E. 772; *Washburn Mill Co.* v. *Bartlett,* supra; *Le France Fire Engine Co.* v. *Mt. Vernon* (1894), 9 Wash. 142, 37 Pac. 287; *Farmers' Loan and Trust Co.* v. *Chicago & N. P. Ry.* (1895), 68 Fed. 412; *Hallam* v. *Ashford,* (1902), 24 Ky. Law Rep. 870, 70 S. W. 197; *Tanner* v. *Nichols* (1904), 25 Law Rep. 2191, 80 S. W. 225; *Prudential Ins. Co.* v. *Cushman* (1906), 130 Iowa 378, 106 N. W. 934.

In general, where a defendant deals with a corporation, and recognizes its capacity to contract as a corporation, he is not permitted later to deny

its existence or authority to make the contract. Thus in *Hallam* v. *Ashford,* supra, Justice BURNAM, speaking for the Court of Appeals of Kentucky, said, "A defendant sued on a contract made with a foreign corporation is estopped from relying on the failure of the corporation to file with the Secretary of State a statement giving the location of its office, and name of its agent within the state upon whom process may be served, as required by Ky. Stat. § 571, as a defense to the action. Likewise, in THOMPSON, PRIVATE CORPORATIONS, the author says: "One who enters into a contract with a corporation, is, when sued by the corporation upon such contract, estopped to deny that the corporation had power to make the contract. The obvious reason for this rule is, that a person ought not to be allowed to oppose such a dishonest defense to a bargain which is fair so far as he is concerned." THOMPSON PRIV. CORP., § 5274. These considerations point to the conclusion that the defendant in *Model Heating Co.* v. *Magarity* was estopped to plead as a defense that the plaintiff corporation had failed to comply with the statutes prescribing the terms on which it might transact business in Delaware.

(III). A defendant sued by a corporation on a contract made with it cannot question the right or authority of the corporation to make the contract or to transact business in the state in which the contract was made; such question being within the exclusive province of the state, *i. e.* the state only can complain. *Merrick* v. *Engine & Governor Co.* (1869), 101 Mass. 384; *Smith* v. *Sheeley* (1870), 12 Wall. 358; *Whitney* v. *Wyman* (1879), 101 U. S. 392; *Nat. Bank* v. *Whitney* (1880), 103 U. S. 99; *Swope* v. *Leffingwell* (1881), 105 U. S. 3; *Fortier* v. *Bank* (1884), 112 U. S. 439; *Fritts* v. *Palmer* (1889), 132 U. S. 285; *Chase Elevator Co.* v. *Boston Boat Co.* (1890), 152 Mass. 428; *Spinney* v. *Miller* (1901), 114 Iowa 210, 86 N. W. 317; *Blodgett* v. *Lanyon Zinc Co.* (1903), 120 Fed. 893, 58 C. C. A. 79; *Prudential Ins. Co.* v. *Cushman* (1906), 130 Iowa 378, 106 N. W. 934; *Iowa Lillooet Gold Min. Co.* v. *U. S. Fid. & Guar. Co.* (1906), 146 Fed. 437; *Boatmen's Bank of St. Louis* v. *Fritzlen et al.* (1909), 175 Fed. 183; *International Harvester Co.* v. *Eaton Circuit Judge* (1910), — Mich. —, 127 N. W. 695.

Whether an incorporated company has authority to transact business, cannot be inquired into in a collateral, but must be asserted in a direct, proceeding against the corporation, instituted by the state. A private citizen is not the party empowered to enforce corporation laws, nor is the nullification of his contracts or of acts done in performance thereof the true remedy for their violation. The state alone is authorized to enforce them, and the ouster or dissolution of the corporation, or an injunction against its proceedings at the suit of the state, is the only remedy available. *Blodgett* v. *Lanyon Zinc Co.,* supra, citing also, *Sioux City R. & W. Co.* v. *Trust Co. of North America,* 82 Fed. 124, 27 C. C. A. 73; *Bank* v. *Townsend,* 139 U. S. 67; *Thompson* v. *Bank,* 146 U. S. 240. The wrong, therefore, which the corporation has done to the public in transcending its power is left to be redressed in a public prosecution against the corporation. The principle is that one who has contracted with a corporation de facto, is never permitted to allege any defect in its organization as affecting its capacity to contract or to sue; but that such an objection, if valid at all, is available only to the

state in a proceeding to oust the members of the franchises which they assume to possess. 4 THOMPSON, CORP., § 5275.

In view of the foregoing considerations, the correct rule would seem to be that a contract executed by a foreign corporation, which has failed to comply with a statute prescribing certain formal conditions on which the corporation may transact business within the state, provided the statute does not expressly invalidate such contracts, can be enforced by the corporation; especially when the statute imposes a distinct penalty for non-compliance. Accordingly, a plea alleging such non-compliance in avoidance of an action on the contract, should be adjudged to be a valid ground of demurrer. A. J. A.

GOOD FAITH AS TEST OF COMMON LAW MARRIAGE.—Does a woman who, in innocence and good faith, marries a man who has a wife living, and continues in ignorance of the impediment after it is removed, become a lawful wife upon the death of the first wife?

This is a question which has vexed the courts for years. It confronted the supreme court of Michigan in a recent case,—*In re Fitzgibbons' Estate* (1910), — Mich. —, 127 N. W. 313. The facts were, briefly, these: William Fitzgibbons married Armenia Allen in the state of New York in 1868. They had three children. In 1878 he left her and came to Saranac, Michigan, where he established a business. In 1881 he went through a marriage ceremony with Sarah Stewart, to whom he represented himself to be an unmarried man. By acquaintances and by society the pair were regarded as married. Their life together was in all respects that of an affectionate married couple. One child was born to them, in 1891. Fitzgibbons, however, knew that his first wife was still living, undivorced, and at intervals sent money for her support. In 1903, Armenia died. About a year later, Fitzgibbons died. Between these two events he continued to live with Sarah as before, treating her affectionately and holding her out to the world as his wife. The evidence tended to show that he never knew of Armenia's death, and that the second wife never knew of her existence. Upon his death the children of the first marriage claimed the estate. The Michigan widow contested the claim on the ground that she was the lawful widow, and entitled to share in the distribution of the estate.

The trial judge instructed the jury that if they found that the plaintiff acted in good faith throughout, in ignorance of the existence of the impediment to her marriage with Fitzgibbons, she became his legal wife as soon as the impediment was removed. The jury so found, and this instruction was assigned for error.

By an evenly divided vote, four to four, the supreme court affirmed the ruling of the trial judge. Mr. Justice MOORE, who wrote the opinion upholding the validity of the marriage, relied upon the natural justice of the case and upon the authority of a recent New York case, *"In re Wells Estate*, 123 App Div. 79, 108 N. Y. Supp. 164, which was based on similar facts, and which held that a common law marriage was presumed as soon as the impediment was removed, provided the parties continued to live together as